

Montana Bankers Association Member Alert

To: MBA Member Banks
From: Steve Turkiewicz, President/CEO
Re: Morrow v. Bank of America, 2014 MT 117

On May 7, 2014, the Montana Supreme Court issued a decision, Morrow v. Bank of America, which significantly increases a bank's exposure to lender liability claims when handling problem loans. Morrow quite clearly expands the type of claims that a borrower may maintain against a bank, even where no express terms of the loan documents have been breached. In a case where Bank of America was accused of mismanaging a HAMP real estate loan modification request, including allegedly advising the borrower to stop making loan payments so they could qualify for a loan modification, the Montana Supreme Court held:

- Under the facts alleged, the bank owed a duty to manage the modification process in a manner that would not cause the borrower to suffer loss or injury by reason of its negligence;
- If proven to be true in a jury trial, advice given to the borrower in the loan modification process could be sufficient to establish a "fiduciary duty" that subjects the bank to additional tort liability (which could include damages for emotional distress and punitive damages);
- Although the statements allegedly made by the bank to the borrower did not establish an enforceable loan modification, those same statements could be used, notwithstanding the Statute of Frauds, to maintain tort claims against the bank for fraud, negligent misrepresentation and constructive fraud; and
- The borrower could also maintain a lawsuit against a bank under the Montana Consumer Protection Act based on allegations that the bank

gave conflicting information and mismanaged the HAMP loan modification process, again notwithstanding the Statute of Frauds and the fact that no written loan term had been breached. This claim exposes the bank to an award of attorney's fees and risk of treble damages.

While the Morrow decision involved a residential loan borrower, the broad language used by the Court will make post-default "mismanagement" type claims more easily available to all types of consumer, commercial and agricultural loan customers.

This decision creates a more difficult environment for lenders working through problem loans. It creates the legal basis for liability for any oral statements made during the negotiation and modification process without requiring a finalized written agreement, even if the earlier loan documents would not permit oral modifications of those earlier written agreements.

In the coming months our office will be considering a number of measures to mitigate the impact of Morrow on the bank/borrower relationship, especially in the workout/problem loan setting. We will also evaluate the need for a legislative response to the problems Morrow is likely to foster.